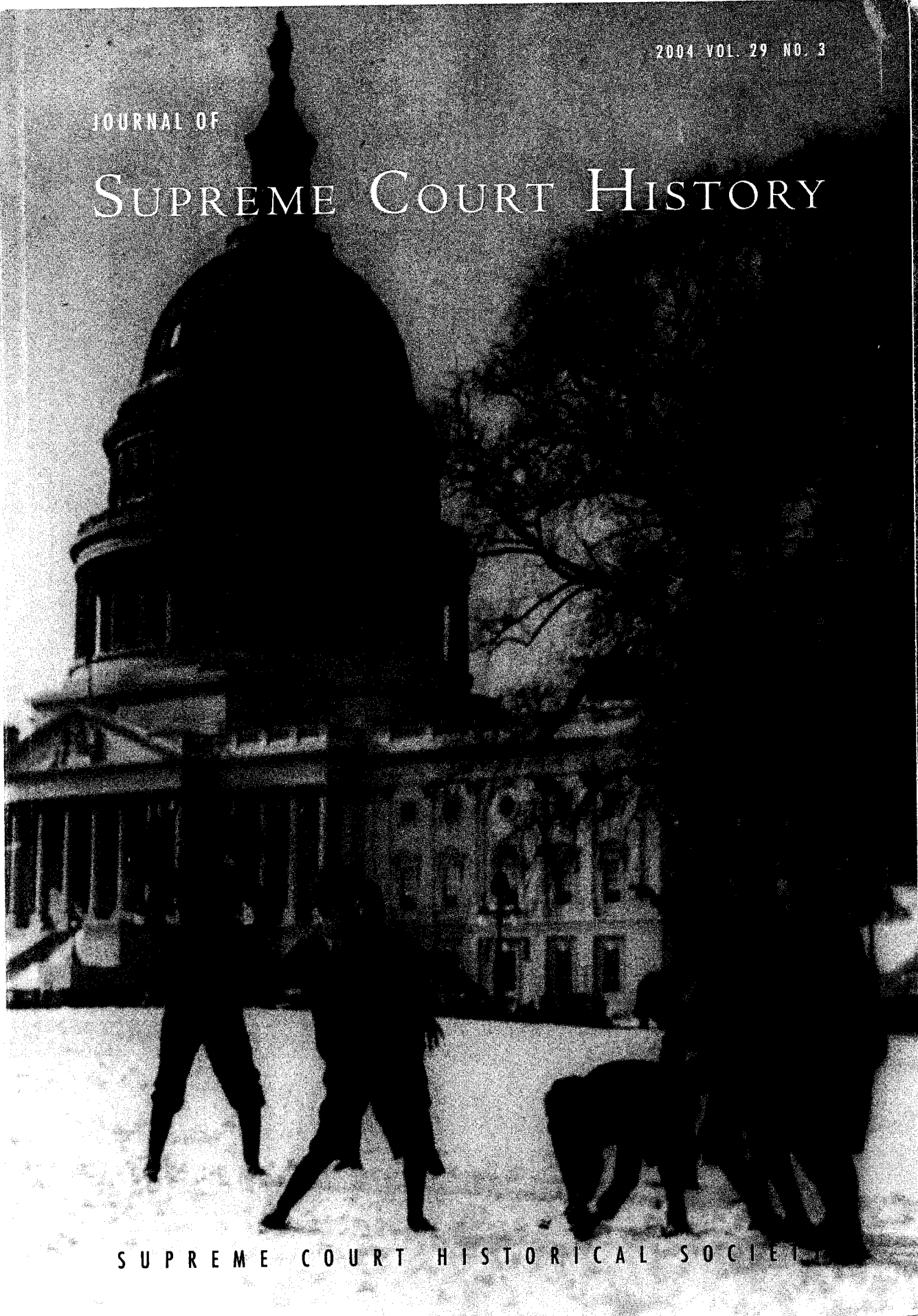


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# Justices Seeking the Presidency

ALLEN SHARP

The separation of powers in the Constitution of the United States has never been absolute in either theory or practice. This is especially true in the quest for public office. At least one President, William Howard Taft, aspired to be a Supreme Court Justice. Several Supreme Court Justices seriously considered becoming President. These are a few stories about those ambitions.

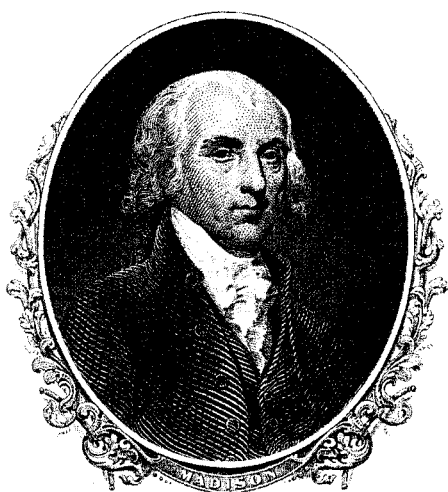
## Flirting with the Federalists, 1812

In 1812, a strong antiwar sentiment existed in the United States, especially in New England. Federalists called it an offensive war, sure to ruin America. Joseph Story expressed concern that "leading Federalists meditate a severance of the Union."<sup>1</sup> Southern Federalist James McHenry of Maryland argued that only a change of administration could save the country. Another Marylander, former Secretary of the Navy Benjamin Stoddert, suggested that Chief Justice John Marshall, a prominent Federalist, should run for President. He wrote, "Marshall is a man in whom the Federalists may confide—perhaps he is the man for crisis."<sup>2</sup> Stoddert was not the only Federalist to support Marshall's candidacy; many powerful members of Congress hoped he would run for President.

Within days after Stoddert's public proclamation, Marshall wrote privately to Robert Smith of Maryland, who had just been dis-

missed as Secretary of State by President James Madison. Smith had engaged in a public antiwar effort and had expressed admiration for Marshall's presidential qualifications. When Smith sent Marshall a copy of an attack he made on his former allies in the Madison administration, Marshall replied:

Although I have for several years forborn to intermingle with those questions which agitate and excite the feelings of party, it is impossible that I could be inattentive to passing events, or an unconcerned observer of them. [But a]s they have increased in their importance, the interest, which as an American I must take in them, has also increased; and the declaration of war has appeared to me, as it has to you, to be one of those portentous acts which ought to concentrate on itself the efforts of all those who can take an active part in



Had Chief Justice Marshall chosen to be the Federalist party's standard-bearer in the 1812 election, he might have fared better than De Witt Clinton (right), the Peace party candidate backed by the Federalists. James Madison (left) beat Clinton 128 to 89, but Marshall's biographer believes that if the Chief Justice had entered the race, he might have prevailed over Madison.

rescuing their country from the ruin it threatens.

All minor considerations should be waived; the lines of subdivision between parties, if not absolutely effaced, should at least be covered for a time; and the great division between the friends of peace & the advocates of war ought alone to remain. It is an object of such magnitude as to give to almost every other, comparative insignificance; and all who wish peace ought to unite in the means which may facilitate its attainment, whatever may have been their differences of opinion on other points.<sup>3</sup>

This letter from Marshall to Smith, sent on July 27, 1812, is described by one of the Chief Justice's biographers, Albert Beveridge, as one of "the longest and most unreserved he ever wrote." Beveridge concludes that "the Chief Justice of the United States was at that very moment not only in close sympathy with the peace party, but was actually encouraging that party in its efforts to end the war."<sup>4</sup>

A later biographer, Leonard Baker, goes further, stating that the letter was a "declaration of his readiness to become a presidential candidate."<sup>5</sup> Most recently, however, Canadian historian Jean Edward Smith has brushed aside any interest that Marshall may have had in the 1812 Federalist presidential nomination.<sup>6</sup> Marshall's conduct and writings seem to indicate a very temporary and transitory temptation, which he soon put aside. If indeed a presidential bug had bitten Marshall, it did not cause any serious infection.

Marshall's competition would have been the politically cunning DeWitt Clinton, a nephew of Vice President George Clinton and a "Peace Republican" from New York who assured Federalists that he favored an "honourable" peace with England. DeWitt Clinton, who ran under the label "Peace party," was endorsed by the Federalist caucus as the antiwar standard-bearer, but not without some acrimony and dissension. Many Federalists preferred Marshall to Clinton.

The electoral vote was Clinton 89, Madison 128. It was the closest any Federalist candidate had come to winning a presidential

election since John Adams in 1800, and their candidate would never get so close again. Optimistically, Beveridge estimates that if Marshall had been nominated:

Marshall surely would have done better than Clinton, who, however, carried New York, New Jersey, Delaware, Maryland and all the New England States except Vermont. The mercantile classes would have rallied to Marshall's standard more enthusiastically than to Clinton's. The lawyers generally would have worked hard for him. The Federalists, who accepted Clinton with repugnance, would have exerted themselves to the utmost for Marshall, the ideal representative of Federalism. He was personally very strong in North Carolina; the capture of Pennsylvania might have been possible; Vermont might have given him her votes.<sup>7</sup>

In a footnote Beveridge adds "the vote of Pennsylvania, with those cast for Clinton, would have elected Marshall."

How would Marshall have acted if nominated? Would he instantly have resigned as Chief Justice, as Justice Charles Evans Hughes would do in 1916? Such a resignation was not a foregone conclusion in 1812. In 1794, Justice William Cushing ran unsuccessfully against Samuel Adams for governor of Massachusetts and did not resign from the Supreme Court. Later, during Marshall's tenure in 1828, Justice Smith Thompson ran for governor of New York against Martin Van Buren and remained on the Court. Would President Madison have made a recess appointment—and if so, who?

### A Politician on the Supreme Court, 1832-1860

Another Justice who attempted to gain the presidency after his appointment to the Supreme Court was John McLean. Historian

Smith captures the elements of why Jackson appointed McLean to the Court in 1829:

Two days after the inauguration, Jackson startled his more clamorous supporters by nominating John McLean of Ohio to fill Trimble's seat on the Court. McLean was a moderate Whig who had served effectively as post-master general under both Monroe and Adams. Before that he had been a judge on the Ohio [S]upreme Court. A political rival of Henry Clay, he had remained on good terms with Jackson throughout the 1828 campaign, and it was widely believed that he harbored presidential ambitions four years hence. He was also known to be opposed to the political spoils system. So long as he remained in the cabinet, it would be impossible to restaff the post office with reliable Democrats. By elevating McLean, Jackson demonstrated the adroitness that made him so formidable. With one stroke, he was shelving a potential presidential opponent, opening the post office to his supporters, rewarding a foe of his old enemy Henry Clay, and disarming the Whigs with a judicial appointment they could only applaud.<sup>8</sup>

During the hotly contested presidential election of 1824, Postmaster General McLean had cleverly tried to stay in office in the Adams administration while engaging in back-channel communications with Jackson's supporters. McLean's biographer describes how he tried to walk a political tightrope between Adams and Jackson and accuses him of duplicity.<sup>9</sup> John Quincy Adams' biographer uses "traitorous" to describe McLean's conduct, saying he "carried water on both shoulders," performing with "Machiavellian adroitness."<sup>10</sup> Jackson rewarded McLean for his allegiance by appointing him to the Court in

1829, where he remained for more than thirty years.

Keenly aware of McLean's Machiavellian tendencies, Jackson admonished him to refrain from dabbling in politics. A former judge on the Supreme Court of Tennessee, Jackson considered judges "as ministers of the Temple of Justice" who should remain separate from party politics.<sup>11</sup> This tough talk apparently did not seriously affect McLean, perhaps because Jackson himself was such a thoroughgoing politician. Indeed, the ink was hardly dry on McLean's Supreme Court commission before he was making political moves to run against its signer. As early as 1829, there were rumors that McLean might join Henry Clay as a vice-presidential running mate in 1832. Friends of John Quincy Adams and Daniel Webster expressed some interest in this idea.<sup>12</sup> At one point, McLean was even suggested as the candidate instead of Clay and his name widely circulated as a possible opponent to Jackson. Within two years of his appointment, McLean, not surprisingly, had fallen out of favor with the Jackson administration. In addition to his political infidelity, McLean publicly opposed Jackson's policies: He disapproved of the President's actions regarding the withdrawal of federal deposits from the Bank of the United States, and he openly supported internal improvements and the protective tariff.

When an anti-Masonic movement aimed primarily at Jackson emerged, McLean began to maneuver to gain favor with the anti-Masons. In September of 1831, anti-Mason delegates convened in Baltimore in one of the first political conventions in the history of the United States. Attendees included such luminaries as Thaddeus Stevens of Pennsylvania, William Sprague of Rhode Island, and William H. Seward and Samuel A. Foote of New York. There was talk of McLean as the presidential nominee at the convention from such political powerhouses as Thurlow Weed and Albert Tracy. But Justice McLean, riding circuit in Nashville, Tennessee, wrote

to the anti-Masons to decline a potential nomination:

My situation on the bench imposes considerations of prudence and delicacy which do not arise, perhaps, from any other official station. Whilst no man can deny the right of the people to select their chief magistrates from any of the branches of the government, it would seem that a member of the judiciary should decline the contest, unless the use of his name would be likely to tranquilize the public mind and advance the prosperity of the county. Without presuming that my name would be favorably considered by the convention . . . I most respectfully decline the honor of being presented to that respectable body for nomination to the presidency.<sup>13</sup>

The anti-Masons eventually nominated William Wirt, Attorney General in the administrations of Monroe and Adams. In the presidential election, Wirt received only the seven electoral votes of Vermont. Despite the letter from Nashville, McLean retained a "flickering illusion"<sup>14</sup> that the various parties might give up on Wirt and Clay and agree on him as a moderate, compromise, anti-Jackson candidate.

Martin Van Buren became the Vice President in Andrew Jackson's second administration, and the President's heir apparent. This frustrated McLean's not-so-latent presidential ambitions during the run up to the 1836 election. Undaunted, McLean worked with quiet diligence to secure the favor of the Whigs, particularly in his home state of Ohio. Millard Fillmore, the anti-Masonic congressman from upstate New York, wrote to McLean that he was opposed to Van Buren and would prefer McLean to any other candidate. In Ohio, young Salmon P. Chase lent his support to McLean over William H. Harrison for the Whig nomination.<sup>15</sup> From 1789 to 1891, Supreme Court Justices were required to hold

court on circuit outside of the nation's capital, and McLean's early circuit included the states of Ohio, Kentucky, and Tennessee.<sup>16</sup> McLean worked very hard as a judge, but he also used these travels for political contacts. On circuit in Tennessee, McLean consulted with James K. Polk, then a member of the United States House of Representatives, and found that future President also to be unenthusiastic about the candidacy of Van Buren.

But, in a move that was becoming a recurring habit, McLean again took himself out of the race. Robert Remini describes McLean's eagerness and withdrawal in the 1836 campaign:

But some states in the West had already started looking at another candidate. With Clay seemingly out of contention—and he made no move to solicit a nomination—the associate Justice of the Supreme Court John McLean of Ohio indicated his willingness to become a candidate. This was not the first time he had appeared ready to run, only to step aside at the last minute. At this juncture he seemed prepared to go the distance, and before the end of the year a rump caucus in Ohio officially nominated him.<sup>17</sup>

A divided Whig party with William Henry Harrison on the ballot in some states, Daniel Webster on the ballot in Massachusetts, and Hugh Lawson White in Tennessee lost the 1836 election to Van Buren.

The growing weakness of the Van Buren administration eventually rekindled McLean's presidential ambitions. He made no serious moves in 1840,<sup>18</sup> but he began to make overtures toward the Whig nomination in 1844. Ohio Congressman Joshua R. Giddings was one of several leaders organizing on McLean's behalf to secure the Whig nomination. It was also suggested that McLean might run as Vice President on the ticket with Clay in 1844. But at the Whig Convention in Baltimore, McLean,

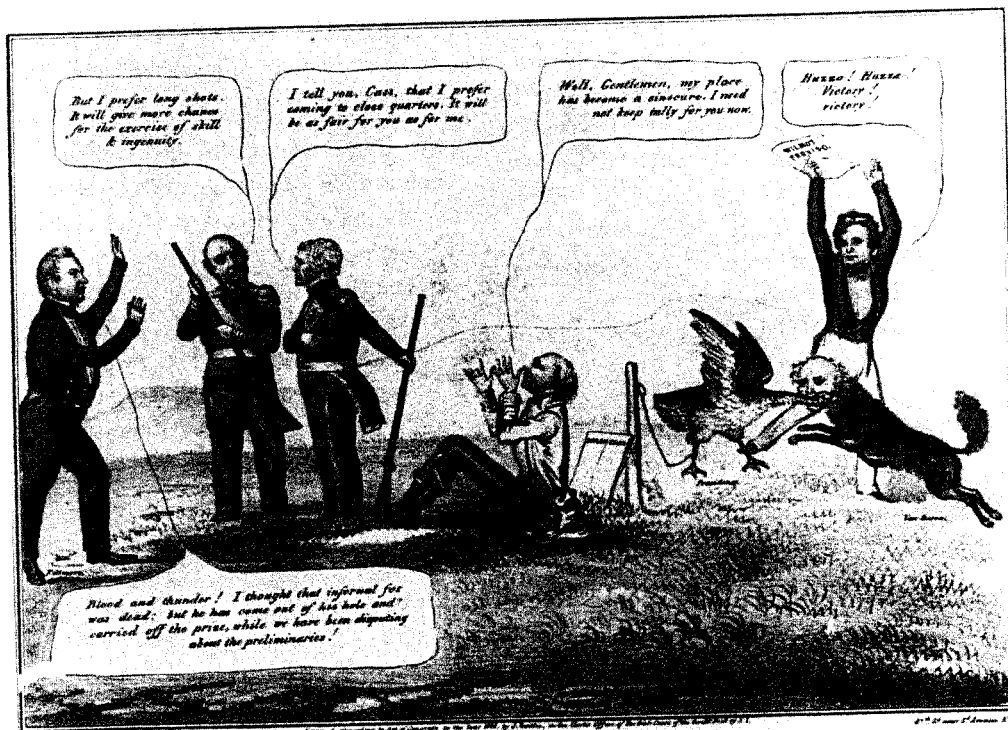
true to form, finally sent a letter declining a possible nomination.

The 1848 presidential election turned out to be a three-way affair, with Lewis Cass for the Democrats, General Zachary Taylor for the Whigs, and former President Martin Van Buren for the Free Soil party, a newly formed antislavery party. Once again, Salmon P. Chase pushed for McLean, lobbying for him to be on the Free Soilers' presidential ticket at its convention in Buffalo, New York. But after a backroom deal with the so-called Barnburners was struck, Chase went before the convention and withdrew McLean's name. McLean later complained that Chase acted without his authority.<sup>19</sup>

The Mexican War became an issue in the 1848 election. Whig leaders Clay, John Quincy Adams and young Congressman Abraham Lincoln all opposed it. Safe on the Supreme Court, McLean had no obligation to speak on the subject, but he had expressed displeasure with the joint-resolution procedure by which Texas was annexed to the United States in 1845. It had also become very difficult for the Whig party to skirt around the issue of slavery, an issue McLean could not duck because it often came before the Supreme Court. In his opinions, the Justice appeared uncertain as to the power of Congress to regulate slavery in the territories.

Yet there was still strong support in Ohio for McLean, who ranked just behind Whig leaders Clay and Webster. Chase noted that the final choice for the Whigs in 1848 was between Clay and McLean. In Indiana, Caleb B. Smith, later Secretary of Interior to President Lincoln, strongly supported McLean's candidacy. But the Whig party decided to paper over its divisions on the slavery issue by nominating a Mexican War hero. McLean's lack of military service made it impossible to compete with General Zachary Taylor.

McLean was also passed over by the Free Soilers in favor of Van Buren, but that party's vice-presidential nomination was tendered to McLean. A letter to Chase from McLean

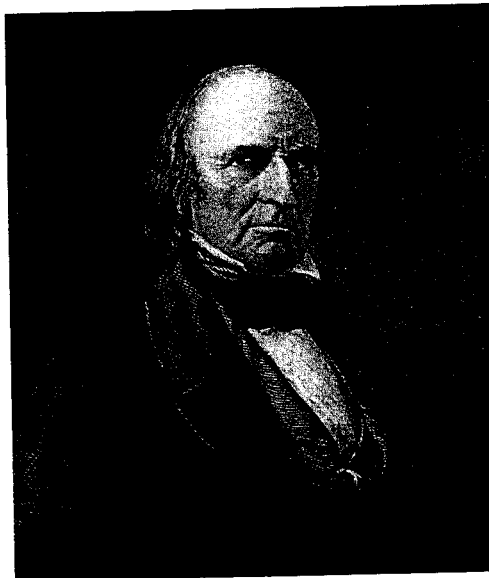


## SHOOTING THE CHRISTMAS TURKEY.

In this cartoon, while Democratic and Whig candidates Lewis Cass (facing front with rifle) and Zachary Taylor (facing left) debate strategies to win the presidency—or “shoot the Christmas turkey”—Free Soil candidate Martin Van Buren (far right, pictured as a fox) makes off with the turkey. But Van Buren’s support for the Wilmot Proviso, which forbade slavery in territories acquired by the Mexican War, cost him the 1848 election and allowed Taylor, a Mexican War hero, to gain the presidency.

kept the door slightly ajar in case there was a “general upheaval” in his favor. No such upheaval occurred. The venerable Free Soil operative in Massachusetts, Charles Sumner, said McLean as a Free Soiler would have easily swept Massachusetts. Sumner wanted McLean to make a public announcement in favor of the Free Soil ticket. Declining, McLean emphasized his by-then-well-known view that he was in opposition to the extension of slavery. Charles Francis Adams ran instead as Van Buren’s Vice President in 1848, but war hero Taylor would carry the day.

The 1856 Republican Convention represented the last real effort by McLean to secure a presidential nomination. By then McLean was a member of the newly created Republican party. Interestingly, McLean had the support of Abraham Lincoln, who had regularly practiced law before him in the



In the run-up to the election of 1848, Supreme Court Justice John McLean (pictured) was seriously considered as a possible candidate by both the Whig and Free Soil parties.



federal courts in Springfield and Chicago. Orville H. Browning, a political powerhouse in Illinois, also supported McLean. So did Ohio lawyer Noah H. Swayne, who would eventually fill McLean's seat on the Supreme Court in 1861. The first ballot at the Republican Convention gave McLean 196 votes to John Charles Fremont's 359, prompting McLean to withdraw his name yet again.

McLean's finest hour on the Court came the next year when he, along with Justice Benjamin Curtis, dissented in *Dred Scott v. Sandford*.<sup>20</sup> At the age of 75, McLean got a few scattered votes in the Chicago Republican Convention that nominated Abraham Lincoln. He died in the first month of Lincoln's administration, giving the President the first of his five Supreme Court vacancies to fill.

### The Presidential Maggot in His Brain<sup>21</sup>

A booster for Justice McLean in several elections, Salmon P. Chase was himself considered but passed over for the 1856 Republican presidential selection. The Ohio governor made a run in the 1860 Wigwam Convention on the Republican ticket, but he managed his campaign poorly. While Chase had been the "favorite son" candidate of Ohio, on the third ballot Ohio changed four votes from Chase to Lincoln, assuring the latter's nomination. The presidential fires, however, continued to burn in Chase, whom President Lincoln named Secretary of the Treasury in 1860. In an attempt to gain the presidency, he tried to undermine the renomination of President Lincoln early on in 1864, courting extreme abolitionists and other Radical Republicans to support his candidacy. When that attempt failed, Chase resigned his Cabinet position. Holding no grudge, Lincoln appointed Chase as Chief Justice on December 6, but not without reservations. As Lincoln confided to Representative George S. Boutwell, "But there is one very strong reason against his appointment. He is a candidate for the Presidency, and if he does not give up that idea it will be very bad for

him and very bad for me."<sup>22</sup> Lincoln's fears about Chase's relentless presidential ambitions proved prophetic:

Mr. Chase will make an excellent judge if he devotes himself exclusively to the duties of his office and don't meddle with politics. But if he keeps on with the notion that he is destined to be President of the United States, and which in my judgment he will never be, he will never acquire the fame and usefulness as Chief Justice which he would otherwise certainly attain.<sup>23</sup>

Chase has received generally good marks for the careful way he handled the attempted impeachment of Andrew Johnson by assuring a fair trial in the Senate. But his sympathy for Johnson caused him to lose favor with members of the Republican party. Since he had been one of the founders of that party in 1856, it would have been logical that he run for the presidency on that party's ticket in 1868. But as the impeachment trial was winding down on May 5, 1868, Chase spoke of his earlier status as a Democrat.

I was a Democrat then, too democratic for the Democratic party of those days; for I admitted no exception, on ground of race or color or condition, to the impartial application of Democratic principles to all measures and to all men. Such a Democrat I am to-day.<sup>24</sup>

After the 1866 midterm elections, however, Ulysses S. Grant began to emerge as the likely Republican candidate. Historian James M. McPherson explains why Chase fell behind Grant:

For almost a year before the Republican Convention met in May, 1868, Ulysses S. Grant seemed sure to become the party's nominee. Grant's only serious rival was Salmon P. Chase, a perennial candidate, whose





Having split with the Radical Republicans over their insistence on maintaining a military occupation in the South, Chief Justice Salmon P. Chase (pictured right) encouraged the efforts of some Democrats to get him the presidential nomination in 1868. This cartoon shows Chase vanquishing the "Radicals" while Democrats remind viewers of earlier Democratic victories. Despite wooing Democrats by modifying his support of black voting rights, Chase did not win the nomination.

ambitions were not satisfied by the chief justiceship of the Supreme Court. Most radicals favored Chase in 1867 and distrusted Grant because of the general's antebellum Democratic leaning and his early postwar identification with Johnson's reconstruction policy. But several developments muted these reservations about Grant: his endorsement of the congressional program in 1867; the Democratic gains in the off-year 1867 elections, which convinced many radicals that they needed to nominate a war hero rather than one of their own in 1868; and Grant's bitter break with Johnson in January 1868. Moreover, Chase's conduct of the impeachment trial, in which he had made clear his sympathy for the President's acquit-

tal, caused the chief justice virtually to be read out of the Republican party.<sup>25</sup>

Thus, the ever politically ambitious Chief Justice Chase began to speak of his Democratic origins. His nineteenth-century biographer, Albert Bushnell Hart, chalks up Chase's political opportunism to his "unsatisfied ambition."<sup>26</sup>

The Democratic Convention was held in New York in the summer of 1868; political operatives William Cullen Bryant, Samuel Tilden, and former Governor of New York Horatio Seymour participated. Others, such as August Belmont, a prominent New York banker, supported Chase. Three weeks before the convention, a committee for Chase was formed in Philadelphia, and Gerrit Smith created a pro-Chase circular, which he mailed out by the hundreds.

Despite this weighty support for Chase, all was not well with his candidacy. That effort "seemed to have drawn Chase down a perilous course where his principles of equal rights for all were being eroded," wrote John Niven, his biographer. "The bright side of his character, the oft-spoken belief in common humanity, was swinging slowly to the dark side of political expediency and even cynicism."<sup>27</sup> Some found it embarrassing that Chase was receiving political support from the former pro-South "peace Democrats," especially the infamous Clement Vallandigham, also from Ohio. In 1864, Chase had participated in the arrest of Vallandigham, a Confederate, and the effort to try him before a military tribunal for sedition. Because of his new supporters, Chase lost the support of former boosters and friends such as James A. Garfield, Samuel C. Pomeroy, John Sherman, and Jay Cooke. Chase waffled on issues weighing the needs of newly freed blacks and former Confederates. He supported voting rights for blacks, but he also favored a general amnesty for former Confederates.

The Democratic party had a two-thirds rule at that time, and their conventions often went into long multiple ballots. As late as the sixteenth ballot, Chase was still alive as a candidate. Biographer Willard L. King states:

He received only a few votes on the convention floor, but in midnight caucuses, with the convention deadlocked, he came close to being chosen. But the suggestion that he was 'dragging his silk gown in the mire' deterred the delegates . . .<sup>28</sup>

When Tilden opted to support fellow New Yorker Seymour, the Chase bandwagon fell. The convention nominated Francis P. Blair, Jr., whom Chase detested, as Seymour's running mate. Chase was disappointed by the outcome of the convention, as was his daughter, Kate Sprague, who ran his campaign. His first

words when he learned of his defeat were, "Does Mrs. Sprague know, and how did she bear it?"

During the 1872 campaign, Chase was ill and near death. According to his biographer, "[d]espite his physical condition, Chase still flirted with a run for the presidency."<sup>30</sup> His support for the Liberal Republicans that year was only halfheartedly expressed: He died on May 7, 1873, having been unable to seriously involve himself in the campaign.

### Lincoln's Convention Manager, 1872

While Chase was too ill to be involved in presidential politics in 1872, another member of the Court, Justice David Davis, did participate. Davis was disenchanted with the Republican party, whose members resented his opinion in *Ex parte Milligan*.<sup>31</sup> Like Chase, Davis had also been displeased with the Seymour-Blair Democratic ticket in 1868. Davis's moment in the sun came in 1872, when Republican factions were looking for a viable candidate against Ulysses S. Grant, who had become a disappointment to many in the Republican party.

In January 1871, a group of legislators from Illinois called on Davis in Washington and urged him to run for President. He thanked them and claimed that he was not fitted for the job. He later recalled the incident, saying, "I give you my word. After they left, I had not walked six blocks before I had my entire Cabinet picked out."<sup>32</sup> Friends from Illinois lawyering and judging days hired Leonard Swett and Jesse W. Fell to begin to turn the political crank for Davis. They contacted New York political operative Thurlow Weed about running a "Davis for President" campaign. Some influential newspapers appeared favorably disposed toward the Illinois Justice. Powerful Illinois Senator Orville Browning disdained Grant and promised Davis support if the Democrats nominated him. Young Melville Fuller, then a Democratic leader in Illinois,



In this Thomas Nast cartoon, Chief Justice Chase (left) counsels Justice Davis (right) not to follow his lead and be consumed by presidential ambitions.

THE PRESIDENTIAL FEVER ON THE SUPREME BENCH.  
*Chief Justice:* "Mark but my fall, and that that ruin'd me.  
*Judge Davis:* I charge thee, fling away ambition!  
 By that sin fell the angels; how can man, then,  
 The image of his Maker, hope to win by't?"—Shakespeare.

expressed an interest in a Davis candidacy. Davis's Republican friends were aghast at his popularity with the Democrats.

Luminaries such as Lyman Trumbull and Charles Sumner in the United States Senate were also disenchanted with Grant and formed a party called the "Liberal Republicans," distinct from the "Radical Republicans." In the meantime, in February 1872 in Columbus, Ohio, the National Labor Union, which included labor leaders from seventeen states, held a convention. The group wanted to nominate Justice Davis, and efforts were made to join forces with the Liberal Republicans. One problem with the platform of the National Labor Union was that it called for expansive paper currency without a metal base and advocated that the currency be issued directly by the government, instead of by banks. When the labor convention tendered its nomination

to the Illinois Justice, Davis responded, "[T]he presidency is not an office to be either solicited or declined."<sup>33</sup> The Liberal Republicans ended up choosing the eccentric Horace Greeley, who lost to Grant running on a liberal platform calling for more honest government.

Four years after his abortive attempts to secure a presidential nomination, Davis resigned from the Supreme Court in 1877 and became a member of the United States Senate from Illinois. In 1881, the Senate was equally divided between Democrats and Republicans. Davis was the only Independent, unaffiliated with any party and a man of conscience. As such, he was elected president pro tempore of the Senate, making him third in line in the presidential succession. For a brief time after the assassination of James A. Garfield in 1881, Davis was next in line for the presidency after Vice President Chester A. Arthur.<sup>34</sup>

### The Field Brothers and the Democrats, 1880 and 1884

It is apparent that the standards for judicial recusal were not rigidly drawn in the nineteenth century. In *Ex parte Milligan*, one of the advocates was David Dudley Field. His brother, Stephen J. Field, was a member of the Court. In spite of Field's advocacy for Lambdin Milligan, Justice Field remained in the case and concurred in the Davis majority opinion. He also sat on other cases where his brother was counsel and wrote the Court opinion in at least one.<sup>35</sup> David Dudley Field used his prestige at the bar and his political influence to secure the Democratic presidential nomination in 1880 for Justice Field. Appointed by Lincoln as the tenth Justice in an enlarged Court, Field was a "War Democrat" who remained loyal to the Union and to the Democratic party. The story of how the brothers secured a presidential nomination for Field is revealing.

Carl Brent Swisher, Field's biographer, has recorded talking points used for Justice Field in the run up to the 1880 Democratic Convention. They included: (1) his pluck shown in various contests; (2) his comparative youth and personal vigor; (3) his record as a War Democrat; (4) his states'-rights record; (5) his hard-money record; (6) his strict construction of the Constitution; (7) his antagonism to presidential election frauds; (8) his freedom from entangling party complications; and (9) his never having voted a Republican ticket.<sup>36</sup> At one point when Field was advancing himself for President in the Democratic Convention of 1880, the *San Francisco Examiner* suggested that the Supreme Court should adopt a rule preventing its Justices from running for President.<sup>37</sup>

In 1877, Field authored an autobiography titled **Personal Reminiscences of Early Days in California**. His two brothers had thousands of copies of it made and circulated as a campaign document, along with the nine talking points referred to above. It was difficult to make Field's substantive due-process

philosophy fit the needs of a Democratic party dominated by Southerners in 1880. Field had voted in favor of the railroad business interests when he dissented in *Munn v. Illinois*.<sup>38</sup> His dissent in the *Slaughterhouse Cases*<sup>39</sup> also won favor with the railroads. He was a close friend of Leland Stanford and C. P. Huntington, both railroad magnates from California. Field's brother, Cyrus, who had gained fame and fortune by laying the Atlantic Cable, also had a business relationship with Huntington.

Field tried to endear himself to the states'-rights southern element by casting a dissent in *Strauder v. West Virginia*,<sup>40</sup> in which he would have permitted states to exclude Negroes from serving on juries. His majority opinions in the test-oath cases were also popular in the South. The Chinese exclusion cases were more difficult for him to make any use of politically. Field had acted on circuit in *In re Ah Fong*<sup>41</sup> in 1874, granting a writ of habeas corpus on equal-protection grounds in the face of a California statute that prohibited Chinese immigrants arriving by vessel from landing until a bond was given by the master of the ship that the immigrants would not become a public charge. Field chose to use some colorful language in his opinion:

I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day without molestation and without censure.<sup>42</sup>

Field's brother Cyrus had a business relationship with Tilden: Both owned a substantial interest in the elevated railways in New York City. At a key moment, Tilden sold his stock, leaving Cyrus high and dry. Cyrus never forgave him, which may explain why Tilden, who remained a power in the Democratic party in 1880, was cool toward Justice Field as a presidential candidate. Despite the Fields paying

the way to the Democratic Convention for a number of delegates,<sup>43</sup> Field was not selected for the ballot. California political operatives aborted any Field presidential effort in 1884 before it even got off the drawing board.

### From the Supreme Court to the Presidency, 1916

Unlike most Justices, Charles Evans Hughes' quest for a presidential *nomination* was a success. This is because he did things right that his predecessors did not. Hughes got his start by leading an investigation into insurance corruption and then being elected Governor of New York in 1906. While Hughes had serious designs on the Republican presidential nomination at the end of his first term as Governor in 1908, he chose not to challenge Theodore Roosevelt's effort to nominate his Secretary of War, William Howard Taft. He did, however, decline a nomination to be Taft's Vice President. At the end of his second term as Governor, Hughes was in the prime of his life, and people considered him an excellent administrator. Edmund Morris calls him a "coldly brilliant Republican lawyer."<sup>44</sup> In 1910, Taft, now President, appointed Hughes to the Supreme Court, where his service was exemplary.<sup>45</sup> Some members of the Court, including Oliver Wendell Holmes, Jr., were very close to him. Others—including Edward Douglass White, whom Taft elevated to Chief Justice despite expectations that he would choose Hughes—were not.

What prompted this talented man to give up the relative security of the Supreme Court to run for President? He is the only Supreme Court Justice to have taken the risk of resigning from the Bench to make a bid for President. Yet, in stark contrast to Justices McLean, Chase and Field, Hughes was dragged into this presidential effort and did not initiate it. Prominent people in the Republican party enlisted a reluctant Hughes to heal the schism in the Republican party created in 1912 when Roosevelt ran as a Progressive against Taft.

In 1916, it was said that only Hughes had a real chance of harnessing the Elephant and the Bull Moose to a victory chariot and defeating President Woodrow Wilson. It would not be easy, however, especially given the antipathy between Hughes and Roosevelt. Roosevelt remembered and did not appreciate how politically independent Hughes, whose first gubernatorial term overlapped with his last two years in the White House, had been as Governor of New York. "I despise Wilson," Roosevelt declared, adding "Hughes is not an attractive personality . . . for he is a very selfish, very self-centered man." At yet another point, Roosevelt said of Hughes, "I thoroughly dislike him."<sup>46</sup> Despite his distaste for Hughes, however, Roosevelt hated Wilson more, so he swallowed his pride and signed on to the 1916 Hughes campaign. Roosevelt sent William Noble to tell Hughes that he considered him the "brainiest man now in public life in the United States" and "the best-equipped man" for the presidency. Roosevelt also believed Hughes to be "sane, safe, and progressive."<sup>47</sup> As he had done twice previously, however, Hughes refused to allow his name to be used in the primary.

On April 11, 1916, former President Taft sent Hughes a long, pleading, and confidential letter, which is set forth in full in his biography by Merlo O. Pusey. The penultimate paragraph of the letter reads:

In view of all this, my dear Justice Hughes, I appeal to you not to decide the question [about running for President] until the Convention acts. Then approach its decision, as you will, with a solemn sense of the responsibility on you and with the willingness to make the sacrifice if your duty to accept appears clear.

Taft added a postscript:

I have written without any one's knowledge. I have not copied this letter. I do not expect an answer. Indeed I would rather not have one.<sup>48</sup>

Hughes did not reply to the Taft letter, and they did not meet again until after the Republican Convention. Senator William E. Borah of Idaho opined that Hughes would carry every Republican presidential primary in 1916 if his name were on the ballot. The polls showed that Hughes was a much more acceptable Republican candidate than Roosevelt. While he expressed a wish to remain on the Bench, Hughes could not bring himself to refuse point-blank to run. Vice President Thomas Marshall publicly praised Hughes before the Chicago Bar Association for not seeking the presidential nomination.

President Wilson dangled the Chief Justiceship before Hughes in an apparent attempt to dissuade him from entering the cam-

paign. Franklin K. Lane, Secretary of the Interior, dropped a hint to Hughes at a dinner party that if he stayed on the Court, he would be appointed as Chief Justice. Hughes never gave the tacit Lane offer any credence, but he did give a remark made by Chief Justice White serious thought, concluding that White must have been speaking at the suggestion of President Wilson when he told Hughes that he would soon retire and that Wilson would then appoint him Chief Justice.<sup>49</sup>

Unlike the situation with Field, when the content of some opinions became a political issue, nothing that Hughes had written on the Supreme Court and none of his votes on cases ever became a liability. When some operatives in the Wilson camp suggested making an issue



When Justice Charles Evans Hughes (pictured) reluctantly accepted the invitation to be the standard-bearer for the Republican party in 1916, he resigned from the Supreme Court the same day, thereby setting a precedent for leaving the bench before launching a political campaign. "I have not coveted its powers," he said of the presidency, "nor do I permit myself to shrink from its responsibilities."



Hughes (on the left standard) lost to President Wilson (on the right standard) in a very close race. He was eventually re-nominated to the Court in 1930 to be Chief Justice.

out of “dragging the Supreme Court into the mire of politics,”<sup>50</sup> they were reminded that in 1904, Alton B. Parker, then a judge on the Court of Appeals in New York, was the Democratic candidate for President. Wilson never made an issue out of Hughes being on the Court.

While the Republican Convention in Chicago was in session and beginning to vote, Hughes asked Robert H. Fuller, who had been his secretary and political advisor in Albany, to come to Washington. This was probably a signal that Hughes had made up his mind to accept the nomination. By the end of the second ballot, however, Hughes believed that he would not be nominated. He consulted with Fuller and continued to profess to his office staff “if they will only choose some one else at Chicago today and let me go out West with my family this summer, I’ll be the happiest man in the world.”<sup>51</sup> But that did not happen.

On the third ballot, the Republican nomination was tendered to Hughes, who, on the very same day—June 10—submitted his resignation to President Wilson. He wired his acceptance to the Republican Convention, saying “I have not desired the nomination, I have wished to remain on the bench. But in this critical period in our national history, I recognize that it is your right to summon and that it is my paramount duty to respond.”<sup>52</sup> Hughes set an important precedent in resigning from the Court in order to run for office. Oliver Wendell Holmes, Jr., expressed his regret and admiration for Hughes’ sense of duty to his country:

#### DEAR HUGHES

Your first thought was of duty. I must confess that pretty near the first view here was the loss to the Court and especially to me. I shall miss you very much in every way—so much so that



I wish the need of the country could have been postponed until I am out of this business. As it is I shall look back with affectionate regret at the ending of the time during which we sat (and stood) side by side.<sup>53</sup>

They would serve together briefly again in 1930–32.

Hughes fell short of the presidency by a handful of votes in the State of California. After his defeat, he became one of the super-lawyers in the country until his appointment as Secretary of State in 1921. Hughes was the acknowledged leader of the American bar in 1930 when President Herbert Hoover named him to succeed Chief Justice Taft, the man who had first placed him on the Court. The best summation of Hughes's tenure as Chief Justice came from President Harry S. Truman: "There never was an abler man or a more ethical one than Chief Justice Hughes."<sup>54</sup>

### Douglas v. Truman, 1944

Tommy "The Cork" Corcoran, a New Deal operative, once said that Justice William O. Douglas "wanted the presidency worse than Don Quixote wanted Dulcinea." Like Justice Davis, Douglas would have been happy gaining the presidency through the "back door" by inheriting it upon the death of the current President. In the 1944 election, his strategy was to be chosen as Vice President by Franklin D. Roosevelt. According to *Time* magazine writer Eliot Janeway, Douglas wanted this position because "he knew the situation with Roosevelt's health. Everyone did."<sup>55</sup> Simon Rifkind once remarked, "I had two classmates who wanted to be President in that class—one [Thomas Dewey] who ran for the office, and one [William O. Douglas] who didn't. [Douglas] just wanted the office handed to him, but he wanted it just as much as the other."<sup>56</sup> Becoming FDR's running mate was



Vice President Henry A. Wallace greeted delegates at the Democratic Convention in Chicago while seeking another term as Vice President. Roosevelt turned against Wallace, however, and chose Harry S. Truman as his running mate. Justice William O. Douglas had also harbored vice presidential aspirations, but he, too, was passed over.

not an easy task. First, Douglas would have to gain favor over Henry A. Wallace, Roosevelt's current Vice President. Then he would have to face an equally daunting task: winning favor over Truman. Douglas succeeded in the first endeavor, but not the second.

Historians have recently examined the political machinations that resulted in Truman's nomination as Vice President at the Chicago Democratic Convention in 1944, and there are some essentials upon which they agree.<sup>57</sup> When Wallace served as Roosevelt's Vice President in his third term, he was considered the darling of the left wing of the Democratic party, especially with the leaders of the Congress of Industrial Organizations (CIO), Sidney Hillman and Philip Murray. In the Cabinet, Harold Ickes, the Secretary of Interior, affectionately known as "The Old Curmudgeon," was also a stalwart Wallace supporter. So were Eleanor Roosevelt and Attorney General Francis Biddle. Wallace's personal and political conduct, however, caused concern for many of the more practical political operators in the Democratic party, including National Chairman Robert Hannegan of Missouri, California's national committeeman Edwin Pauley, and Postmaster General Frank Walker. There was a behind-the-scenes effort by Hannegan, Pauley, and Walker to get Wallace off the ticket. These and many other operators in the Democratic party were keenly aware of the fragile health of the President and realized that in selecting the Vice President, they were also likely selecting a President.

Roosevelt was never one to dwell on his own fallibility and was indirect in handling this sensitive political question. Some have described his dealings in this situation as "devious."<sup>58</sup> James MacGregor Burns said FDR never pursued a more Byzantine course than in his handling the question of the vice presidency in 1944.<sup>59</sup> The President sent a letter to Senator Sam Jackson, the convention chair, stating that if he were a delegate to the convention he would vote for Wallace, a good friend, but that he did not want to tell the convention what to do. Roosevelt also told his

Chief of Staff, former South Carolina Senator and former Supreme Court Justice James F. Byrnes, that Byrnes had the most comprehensive knowledge of how government worked. But Roosevelt raised questions about Byrnes' former Catholicism, stance on the poll tax, and standing with Negro voters. Byrnes later complained that FDR resorted to outrageous subterfuge in selecting a Vice President.<sup>60</sup>

But the key event, which is still the subject of considerable discussion and dispute, was a meeting held by Hannegan, Walker, Pauley, Chicago Mayor Ed Kelly, Bronx boss Ed Flynn, and others in the White House with Roosevelt before the Democratic Convention on July 11, 1944. That meeting produced a handwritten note, now in the Truman Library:

July 19

Dear Bob:

You have written me about Harry Truman and Bill Douglas. I should of course be very glad to run with either of them and believe that either was a better man for the job than I am. I am a fighter to the end.

Yours sincerely,

Robert Hannegan

At a later time, the note, postdated, was typed and signed by the President in the following form:

The White House  
Washington

July 19, 1944

Dear Bob:—

You have written me about Harry Truman and Bill Douglas. I should, of course, be very glad to run with either of them and believe that either

one of them would bring real strength to the ticket.

Always sincerely,  
/s/Franklin D. Roosevelt  
Honorable Robert E. Hannegan  
Blackstone Hotel,  
Chicago, Illinois.<sup>61</sup>

This note seemed to eliminate one roadblock from Douglas's path to the vice presidency: namely, it made it appear that Wallace was now out of the picture. Douglas's future still looked good. He was one of FDR's poker-playing buddies and a loyal supporter of the New Deal. The President also seemed enthusiastic about Douglas as a running mate because Douglas was from the West and had a Boy Scout image. Moreover, Roosevelt was less than enthusiastic about Truman and had raised questions about his age. He was also quoted as saying that he did not know Truman well.<sup>62</sup> Jimmy Roosevelt later said, "Although Father did not commit himself, I came away with the distinct impression that he really preferred Justice William O. Douglas as the vice-presidential nominee."<sup>63</sup> Douglas's biographer Bruce Allen Murphy brings forth evidence that Douglas was very much involved and was being kept informed by a coterie of Democratic political operatives working on his behalf. These included a man named Teddy Hayes (one of the key people working for Ed Flynn, the Democratic boss in the Bronx, who was in touch with Douglas on a regular basis), as well as New Deal operatives such as Eliot Janeway, the economics editor of *Time*, Leon Henderson, a wartime price administrator, Abe Fortas, assistant to Interior Secretary Harold Ickes, and Lyndon Baines Johnson, a young Congressman from Texas. New Deal operative Corcoran was also in on the Douglas effort. Ickes and Attorney General Homer S. Cummings now supported Douglas as well.

Unfortunately for Douglas, the road was not as smooth as he had hoped. It is not completely clear how Truman advanced ahead of Douglas. One possibility is that the note written by Roosevelt to Hannegan was doctored or distorted. Some sources suggest that Hannegan

put his thumb over Douglas's name, or that in coordination with the President's Secretary, Grace Tully, he transposed the names to put Truman's name first.<sup>64</sup> Historians Robert H. Ferrell and Bruce Allen Murphy are both emphatic that there is no credence to the switched-names story, which was advanced by Corcoran.<sup>65</sup>

Roosevelt himself may also have been directly responsible for jilting Douglas. Ferrell has concluded that the events show "President Roosevelt elevated untruthfulness to a high art."<sup>66</sup> As the Democratic Convention was being held in Chicago, FDR met with Hannegan on the train called the Magellan, which was secretly parked on a Chicago siding, and tacitly approved the nomination of Truman.

Despite Roosevelt's apparent dismissal of Wallace, many at the convention still supported him, including the leaders of the CIO and the permanent chairman of the convention, Senator Jackson. According to Ferrell, there came a point when "Roosevelt . . . turned against Wallace."<sup>67</sup> But events unfolded so fast in the convention that the Truman nomination for Vice President was a done deal before there was any opportunity for Wallace's people to gather around a Douglas nomination. Douglas was in the mountains, but he was at a location where he could be reached by telephone. If not overtly involved, he was intensely interested. When the final roll call for Vice President was called, Douglas ended up with only a small handful of votes and seemed distressed when Hayes called to give him the bad news. When Hannegan and Douglas saw each other later at a party, Douglas asked how Hannegan had stage-managed the Truman nomination and killed off his and Wallace's renomination in the process. Hannegan replied to Douglas that there might be something for him in 1948.

### Truman and Douglas, 1948: A Second Fiddle to a Second Fiddle

By early 1948, many in the Democratic party had become disenchanted with the presidency of Harry S. Truman. He had replaced almost

all of Roosevelt's Cabinet. In most instances he did it gently, but in the case of Francis Biddle, Attorney General, there was not much gentle about it: The man from Independence and the Philadelphia aristocrat just did not get along. The newly formed Americans for Democratic Action (ADA), led by persons such as historian Arthur M. Schlesinger, Jr., began to openly complain about Truman. Representative Franklin D. Roosevelt, Jr., a New York Congressman at the time, was also critical of Truman. He persuaded his mother, Eleanor Roosevelt, to join the ADA. A candidate who appealed to many of the leaders of the ADA was army general Dwight D. Eisenhower, now president of Columbia University. However, Eisenhower declined to become involved in running for President on the Democratic ticket.

To many of the leaders of the Democratic party, William O. Douglas was still an appealing alternative, and Douglas took his candidacy seriously for a while. Long-time Washington insider Clark Clifford said, "Douglas wanted to be President, of that I had no doubt."<sup>68</sup> It appears that President Truman was genuinely interested in having Justice Douglas on his ticket as Vice President, prompting former Senator Burton K. Wheeler of Montana, an erstwhile political enemy, to say that the Democratic vice presidential nomination in 1948 would be a second fiddle running with a second fiddle.<sup>69</sup>

Douglas was certainly tempted to run with Truman, but not tempted enough to ignore the problems that his nomination would cause in other areas of his life. His marriage to Mildred Douglas was on the rocks, but she was

Justice Douglas (left, back row) considered running against President Truman (front, center) in the Democratic primary in 1948 but did not want to take the risk of resigning from the bench to campaign because his finances were precarious. President Truman sent emissaries to persuade Douglas to be his running mate, but Douglas declined, in part because he was not sure Truman would win the election.



adamantly opposed to his leaving the Court. The Douglasses did not have significant financial resources, and they needed the Court salary just to make it day to day. Douglas was aware of the precedent set by Charles Evans Hughes in 1916, and he knew that if he were nominated he would have to resign immediately. In addition to his financial concerns, Douglas may have also doubted Truman's ability to win the election. He certainly would not have been alone in doing so, since early in the race few people thought Truman had a chance. Truman sent several emissaries to entice Douglas, including Clifford, Fortas, Hannegan, and Eleanor Roosevelt. Eventually, in a somewhat tense telephone conversation, Douglas declined the opportunity to be on the ticket, telling Truman that he chose to remain on the Bench. His desire to become President—or even Vice President—went unsatisfied.

#### Robert H. Jackson's Presidential Ambition?

Judge Richard Posner has argued that William O. Douglas was not the only member of his Court with an eye on the presidency: Robert H. Jackson also had such ambitions.<sup>70</sup> But evidence of any presidential ambitions by Justice Jackson is minimal, especially during the time he spent on the Supreme Court, from 1941 to 1954. Jackson scholar John Q. Barrett suggests that any such ambitions on the part of Jackson would predate his Supreme Court tenure.<sup>71</sup>

In the run up to the 1940 presidential election before President Roosevelt announced for a third term, Jackson, then in the Justice Department, was put forth to make the case for the New Deal in a major 1939 nationwide radio debate with Wall Street lawyer and future GOP candidate Wendell Wilkie. Jackson was considered a rising star with some potential for the 1940 Democratic presidential nomination, and at that point he probably did have presidential aspirations.<sup>72</sup> Certainly Jackson

would have been considered a strong candidate in 1940 if Roosevelt had declined to run, but Jackson was an all-out supporter of Roosevelt and would never have challenged him. Any vice-presidential aspirations Jackson might have had in 1940 and 1944 could not have been acted upon, because he and FDR were both from New York and subject to the "same state provision" in Amendment XII of the Constitution.

There is a remote possibility that Jackson, whom Roosevelt appointed to the Court in 1941, harbored presidential ambitions in either 1948 or 1952. He would have had a motive to run for President after Roosevelt died because, according to Barrett, he did not consider Truman a worthy successor to Roosevelt. Even Truman viewed Jackson as a Democrat with presidential potential, and he considered him a possible competitor in 1948. But Jackson took no action in that direction after his wrenching and exhausting experiences as the American prosecutor at Nuremberg. Eugene C. Gerhart's extensive writings on Jackson in *America's Advocate* make no mention of any presidential ambitions while he was on the Supreme Court.<sup>73</sup>

#### Conclusion

Some of the most talented Justices of the Supreme Court have considered seeking the presidency. For some of them, the desire was brief and minimal. Chief Justice John Marshall indulged in only a fleeting and private flirtation with the presidency, rather than a dalliance that evolved into a political engagement. Likewise Justice Jackson, while he may have considered the presidency, certainly took no overt action to attain it. For others, the dream of becoming President was ongoing, substantial, and occasionally even consuming. Although Justices Douglas and Davis tried to seize the presidency indirectly, by becoming the Vice President or president pro tempore under a sickly President, both men had their heart set on becoming President.

Other Justices were more direct in their route. Justice McLean involved himself in presidential politics for over a quarter of a century; no other Justice before or since has invested so much time in seeking the White House. Chief Justice Chase's preoccupation with the presidency began long before he was appointed to the Court, making his commitment to judicial service a concern to President Lincoln and others. Chase's lust for the presidency manifested itself in many ways, including an attempt to sabotage Lincoln's 1864 renomination. Justice Field's presidential preoccupation was limited to the time surrounding the Democratic Convention of 1880, but his involvement may have influenced several important Court decisions during this time. Justice Hughes was the most successful in his quest: after being drafted as the Republican candidate against his wishes, he resigned from the Supreme Court and lost a very close race to President Wilson.

Whether a Justice thirsted for the presidency or merely considered it in passing, it is clear that the Supreme Court Bench has been a perch from which it is very difficult to fly to the Oval Office.

## ENDNOTES

<sup>1</sup>Joseph Story, *Life and Letters*, ed. William W. Story (Boston, (John Chapman, London, 1851), August 24, 1812, vol. 1, p. 229.

<sup>2</sup>Letter from Stoddert, July 15, 1812, in Bernard C. Steiner, *The Life and Correspondence of James McHenry* (The Burrows Brothers Co., 1907), p. 581. *See also* James H. Broussard, *The Southern Federalists, 1800-1816* (Louisiana State University Press 1978).

<sup>3</sup>*The Papers of John Marshall*, ed. Charles F. Hobson et al. (University of North Carolina Press, 1974-1995), vol. 7, pp. 337-38.

<sup>4</sup>Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Houghton Mifflin, 1916-1919), vol. 4, pp. 37 and 41.

<sup>5</sup>Leonard Baker, *John Marshall: A Life in Law* (Macmillan Publishing Co., 1974), p. 532.

<sup>6</sup>Jean Edward Smith, *John Marshall: A Definer of A Nation*, (Henry Holt and Company, 1996), p. 410. Smith edits out key parts of the July 27, 1812 letter.

<sup>7</sup>Beveridge, *Life of John Marshall*, vol. 4, p. 47.

<sup>8</sup>Smith, *Marshall*, p. 503.

<sup>9</sup>Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (The Ohio State University Press, 1937), p. 48. This book is the basic source of the detail on McLean's political activities. Unless otherwise indicated, the specifics in this section are from this source. Also of interest are McLean's circuit-riding activities, discussed in Joshua Glick, "On the Road: The Supreme Court and the History of Circuit Riding," *24 Cardozo L. Rev.* 1753, April 2003. *See pp.* 1802-3 and 1806.

<sup>10</sup>Paul C. Nagel, *John Quincy Adams* (Alfred A. Knopf, 1997), p. 317.

<sup>11</sup>*Reminiscences of James A. Hamilton*, (Charles Scribner & Co., 1869), pp. 162-63. Hamilton was a South Carolina Congressman and Governor in the 1820s and 1830s. Cited in Weisenburger, *McLean*, p. 69 n. 12.

<sup>12</sup>Robert V. Remini, *Daniel Webster: The Man and His Time* (W. W. Norton & Co., 1997), p. 427.

<sup>13</sup>Weisenburger, *McLean*, p. 79.

<sup>14</sup>*Ibid.*

<sup>15</sup>The connection between McLean and Chase was extended when, after the death of his first wife, Chase married Sarah Belle Dunlop Ludlow, making McLean an uncle by marriage to Chase. The marriage ceremony was held in the McLean home.

<sup>16</sup>At a later time, his circuit included Ohio, Indiana, Illinois, and Michigan.

<sup>17</sup>Remini, *Daniel Webster*, p. 427.

<sup>18</sup>During the administration of John Tyler, Secretary of State Daniel Webster persuaded the President to nominate McLean as Secretary of War. Although the United States Senate promptly confirmed him in 1841, McLean just as promptly declined that office. Given that the Supreme Court then met in the Capitol only a few doors from the Senate, it would be hard to conceive that McLean did not know about the move to appoint him to the Cabinet. He let his nomination be confirmed only to immediately decline the office. The catch-and-release equation at work again? Weisenburger, *McLean*, pp. 102-3.

<sup>19</sup>John Niven, *Salmon P. Chase, A Biography* (Oxford University Press, 1995), p. 110.

<sup>20</sup>60 U.S. 393 (1857).

<sup>21</sup>The exact source of this comment by Lincoln about Chase is quoted in a letter from Thurlow Weed to John Bigelow, December 13, 1863, *John Bigelow: Retrospectives of an American Title* (Baker and Taylor, 1909-13), vol. 2, p. 110. *See also* Michael Burlingame, *The Inner World of Abraham Lincoln* (University of Illinois Press, 1994), p. 173, and a brief parallel reference in John Hay, *Lincoln and The Civil War* (Dodd, Mead & Co., 1939), p. 110. This phrase is also reflected in Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press 1993), p. 97.

<sup>22</sup>Recorded in David M. Silver, *Lincoln's Supreme Court* (The University of Illinois Press, 1956), pp. 207-8 (referring to George S. Boutwell, *Reminiscences of Sixty Years*

- in *Public Affairs* (New York, 1902), vol. II, p. 29). See *Ex parte Vallandigham*, 68 U.S. (1 Wall) 243 (1864).
- <sup>23</sup>Niven, *Chase*, p. 374.
- <sup>24</sup>Albert Bushnell Hart, *Salmon Portland Chase* (Houghton Mifflin, 1899), p. 366.
- <sup>25</sup>James M. McPherson, *Ordeal by Fire: The Civil War and Reconstruction* (Alfred A. Knopf, 1982), p. 541.
- <sup>26</sup>Hart, *Chase*, p. 362.
- <sup>27</sup>Niven, *Chase*, pp. 428–29.
- <sup>28</sup>Willard L. King, *Lincoln's Manager, David Davis* (Harvard University Press, 1960), p. 271, a basic source here.
- <sup>29</sup>John Niven, *Salmon P. Chase, A Biography* (Oxford University Press, 1995), p. 432.
- <sup>30</sup>Niven, *Chase*, p. 447.
- <sup>31</sup>71 U.S. (4 Wall) 2 (1866).
- <sup>32</sup>King, *Davis*, p. 277.
- <sup>33</sup>King, *Davis*, p. 279.
- <sup>34</sup>James A. Garfield died September 18, 1881. From that date until March 3, 1883, when his term in the U.S. Senate ended, Davis was second in the line of succession to be President. It is now known that Arthur's illness was life-threatening. See Thomas C. Reeves, *Gentleman Boss: The Life of Chester Alan Arthur* (Alfred A. Knopf, 1975), pp. 317–18.
- <sup>35</sup>*Cummings v. Missouri*, 71 U.S. 277 (1866), a landmark test-oath case.
- <sup>36</sup>Carl Brent Swisher, *Stephen J. Field, Craftsman of the Law* (Brookings Institution, 1930), pp. 286–87.
- <sup>37</sup>*San Francisco Examiner*, October 27, 1879. This and other basic information is gleaned from Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (University of Kansas Press, 1997). This journal has recently published the entirety of Field's "Personal Reminiscences," with an excellent introduction by Paul Kens. *Journal of Supreme Court History* 2004, vol. 29, no. 1. There, Professor Kens makes a careful, detailed study of Field's Supreme Court opinions and analyzed how they related to his political campaign.
- <sup>38</sup>94 U.S. 113 (1877).
- <sup>39</sup>83 U.S. (16 Wall) 36 (1873).
- <sup>40</sup>100 U.S. 303 (1880).
- <sup>41</sup>*In re Ah Fong*, 1 Fed. Cas. 213 (C.C. Cal. 1874) (Field, J.).
- <sup>42</sup>See *id.* This subject is covered in Kens, *Field*, pp. 200–217. See also *Tung v. Freeman*, 92 U.S. 275 (1876).
- <sup>43</sup>Kens, *Field*, p. 233.
- <sup>44</sup>Edmund Morris, *Theodore Rex* (Random House, 2001), p. 465.
- <sup>45</sup>Henry J. Abraham, *Justices, Presidents, and Senators* (Rowman & Littlefield Publishers, 1999), p. 127.
- <sup>46</sup>H. W. Brands, *T.R., The Last Romantic* (Basic Books, 1997), pp. 773–76.
- <sup>47</sup>Merlo J. Pusey, *Charles Evans Hughes* (The Macmillan Co., 1951), p. 316.
- <sup>48</sup>*Id.*, pp. 317–19.
- <sup>49</sup>The incidents (offer?) are recorded in David J. Danelski and Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes* (Harvard University Press, 1973) p. 180.
- <sup>50</sup>Pusey, *Hughes*, p. 333.
- <sup>51</sup>*Id.*, p. 328.
- <sup>52</sup>Danelski and Tulchin, *Autobiographical Notes*, p. 181.
- <sup>53</sup>Pusey, *Hughes*, p. 333.
- <sup>54</sup>Letter to Merlo J. Pusey from H. S. T., July 11, 1950. Recorded in Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (Bobbs-Merrill Co., Inc., 1958), pp. 283–84.
- <sup>55</sup>Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (Random House, 2003), p. 218.
- <sup>56</sup>Murphy, *Douglas*, pp. 212.
- <sup>57</sup>In addition to Murphy's *Douglas*, there are two excellent biographies of Truman: David McCullough, *Truman* (Simon & Schuster, 1992); and Robert H. Ferrell, *Harry S. Truman: A Life* (University of Missouri Press, 1994). See also Robert H. Ferrell, *Choosing Truman: The Democratic Convention of 1944* (University of Missouri Press, 1994), and Frank Freidel, *Franklin D. Roosevelt: A Rendezvous With Destiny* (Little Brown, 1990), pp. 525–38.
- <sup>58</sup>James MacGregor Burns, *Roosevelt: Soldier of Freedom* (Harcourt Brace Janovich Inc. 1970) p. 503. David McCullough, *Truman* (Simon & Schuster, 1992) p. 295 states "As the historian James MacGregor Burns, then a member of the White House staff, later wrote, Roosevelt never pursued a more Byzantine course than in his handling of this question."
- <sup>59</sup>McCullough, *Truman*, p. 295.
- <sup>60</sup>James F. Byrnes, *All in One Lifetime* (Harper, 1958), p. 255.
- <sup>61</sup>The handwritten note is lifted from the Walker autobiography, *FDR's Quiet Confidant: The Autobiography of Frank C. Walker*, ed. Robert Ferrell (University of Colorado, 1997), 141. The typed version is in all the basic sources. The author is not qualified to wade into some of the controversy about the handwritten note. The two versions were provided to the Truman Library by the family of Robert Hannegan. Professor Murphy deals in great detail with this subject in *Douglas*, in an extended four-page footnote at pp. 605–8. Ferrell also presents a lengthy footnote in *Choosing Truman*, pp. 120–21 n. 4, concluding that the issue about the note (notes) is "downright perplexing." Murphy doubts the switched-name thesis again in a lecture originally delivered on March 18, 2003 at the Cato Institute as recorded on C-Span 2. The tape had been carefully reviewed here.
- <sup>62</sup>"I hardly know Truman." McCullough, *Truman*, p. 292.
- <sup>63</sup>James Roosevelt and Sidney Shalett, *Affectionately, F.D.R.: A Son's Story of a Lonely Man* (Harcourt, Brace,



1959), p. 351. A recent biography of FDR states: "It is not plausible that Hannegan misled the president's secretary, as some have suggested, into reversing the order of the two preferred candidates." Conrad Black, **Franklin Delano Roosevelt**, (Public Affairs, 2003), p. 971. Thus, Ferrell's general view is reaffirmed.

<sup>64</sup>Grace Tully, **F.D.R., My Boss** (Charles Scribner's Sons, 1949), pp. 275-77. The paragraph on this incident is revealing:

The historic significance of the incident sprang to my mind when the President died in 1945. I searched our files for the carbon copy of the original version of the letter. It was never found. Dorothy Brady, my assistant, had done the actual retyping and apparently had destroyed the first version when she had completed the final letter. It was a routine and quite logical action on her part—first drafts of letters which are amended before sending are never retained—

but it is one case in which an original would have had great historical interest.

William O. Douglas wrote the forward to the Tully book.

<sup>65</sup>See note 60.

<sup>66</sup>Ferrell, **Choosing Truman**, p. 91.

<sup>67</sup>Ferrell, **Truman**, p. 164. Allen Drury, *New York Times* reporter and novelist, called FDR's treatment of Wallace "perhaps the coolest and cruelest brush-off in all the long Roosevelt career." Allen Drury, **A Senate Journal: 1943-1945** (McGraw-Hill, 1963), p. 218.

<sup>68</sup>Murphy, **Douglas**, p. 253. For the Clifford statement and discussion, see Clark Clifford, **Counsel to the President: A Memoir** (Random House, 1991), pp. 215-16.

<sup>69</sup>Murphy, **Douglas**, p. 255.

<sup>70</sup>Richard A. Posner, "The Anti-Hero," *The New Republic*, February 24, 2003.

<sup>71</sup>Memo to author from John Q. Barrett, June 4, 2003.

<sup>72</sup>See comments in the *New York Times*, January 19, 1958.

<sup>73</sup>See note 53.